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No. 80-2066

IN THE

Supreme Court of the United States

October Term, 1980

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and The Associate Justices of the United States Supreme Court:

Pursuant to Rule 36 of the Rules of this Court, the American Council on Education (the "Council") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioner, the University of Pittsburgh (the "University"), in this case. In support of this motion, the Council shows as follows:

1. The American Council on Education is a voluntary nonprofit membership corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council's membership consists of over 1400 public and private colleges and universities in the United States and over 340 educational associations and organizations.

2. The Council is the major coordinating body for all segments of post-secondary education in the United States and has represented the interests of higher education before the Executive, Legislative and Judicial branches of Government. The Council has a depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements as they impact on the nation's colleges and universities. The Council is thus uniquely qualified to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

3. Substantially all of Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. #2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case.

4. Because of its interest in issues pertaining to equal opportunity, on several other occasions, the Council has sought and been granted permission by this Court to file briefs as *Amicus Curiae. See, e.g., Camenish v. University of Texas,* ____ U.S. ____ (1981); *Southeastern Community College v. Davis,* 442 U.S. 397 (1979); *Cannon v. University of Chicago,* 441 U.S. 677 (1979); *Board of*

Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1979).

5. The Council, and its members, have broad knowledge concerning the practical and legal application of the statutes and related issues involved in this case. Because of this knowledge and its extensive experience as *amicus curiae* in other cases, the Council is well situated to brief this Court on the practical as well as legal implications of the issues presented by the decision below.

6. Consent to file this brief has been requested from both parties but has not yet been received.

WHEREFORE, it is respectfully moved that the American Council on Education be granted leave to file the accompanying *Amicus Curiae* brief in this case.

Respectfully,

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BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The American Council on Education (the "Council") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case filed by the University of Pittsburgh (the "University").

STATEMENT OF THE CASE

On Juiy 8, 1977, an officer of the American Nurses' Association ("ANA") filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on behalf of certain female faculty members in the Univer-

sity's School of Nursing. The charge alleged that "the University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying lower monthly salaries than the ones paid to male faculty employees."

Thereafter, The EEOC issued a subpoena seeking, for a three-year period, salary and other information on faculty members employed in the School of Nursing and on all faculty members employed in three other professional schools of the University: the School of Social Work, the School of Health-Related Professions and the Schools of the Pharmacy. The information subpoenaed by the EEOC included the sex, date of hire, academic degree, tenure status, and initial and present salaries of all such faculty members. The EEOC asserted the information was relevant because, in the EEOC's view, discrimination could be inferred if "women instructors and professors performing similar duties are paid lower salaries than male instructors and professors."

The University refused to provide the salary data requested because it believes the salaries of faculty members in professional schools other than the School of Nursing are irrelevant to any investigation of the complaint before the Commission and because it believes the disclosure of such irrelevant personally identifiable data constitutes an unwarranted invasion of privacy which contravenes the University's policy and practice of maintaining all faculty salaries in strict confidence. The EEOC moved to enforce the subpoena and the University filed a verified answer denying the relevance of faculty salaries paid in professional schools distinct from the School of Nursing. The verified answer asserted that faculty members in separate professional schools had such different education, training, missions, goals, external funding, students, programs,

courses and course loads that their salaries could not be compared.

Despite the existence of controverted allegations of relevance, the District Court placed on the University the burden of going forward with evidence to disprove the relevance of the information sought. The University then went forward with the evidence and established, through the EEOC investigator who prepared the subpoena, that the sole reason the EEOC sought information on schools unrelated to the School of Nursing was to compare the salaries of faculty members in those schools with the salaries of faculty members in the School of Nursing.

The University then established, through the unchallenged testimony of the Deans of the four professional schools involved, that no such comparisons could be made because faculty members in separate professional schools had differing skills, duties and responsibilities, backgrounds and training, research and publication responsibilities, and other separate missions and tasks. Moreover, the unrebutted evidence adduced by the University at the hearing established that the demands of the marketplace for differing professional expertise caused differing professional salaries.

The District Court issued an Order enforcing the subpoena. The Third Circuit Court of Appeals affirmed, holding that information involving separate professional schools "may provide a useful context for evaluating the practices under investigation" and that the information sought was relevant because the School of Nursing was "almost totally female." The Third Circuit, while apparently recognizing that the Government has the burden of proof on the question of relevance, did not expressly rule on the University's contention that the burden had been improperly placed on the University.

REASONS FOR GRANTING THE WRIT

Faculty members engaged in different disciplines command different salaries, depending upon supply and demand in the academic marketplace and the level of student enrollments, alumni support, government appropriations and extrinsic competition for faculty services. The issue presented in this case is whether women who are faculty members in a predominantly female professional school can establish sex discrimination *solely* by comparing their salaries to those paid to men on the faculties of other separate and distinct professional schools. This issue was specifically left unresolved by this Court's recent decision in *County of Washington v. Gunther,* 49 U.S.L.W. 4623 (June 8, 1981).

Currently, salaries paid to faculty in one professional or scholarly field are not determined by or dependent upon salaries paid to faculty in other professional or scholarly fields. Colleges and universities in the United States do not determine the salary of a history professor based upon the salary necessary to attract or retain a pharmacy professor for the institution's school of pharmacy. The salary of a teacher in a home economics department is not governed by the salary necessary to attract a professor of surgery in an institution's school of medicine. The salary paid to a professor of maternity nursing is not dependent upon the salary necessary to attract or retain a professor of electrical engineering. It is extremely important for the nation's colleges and universities to know whether federal law requires a change in these salary administration practices.

In addition, institutions of higher learning in this country need to know whether an administrative agency is entitled to unlimited access to sensitive, confidential, personally identifiable faculty records without first

demonstrating the relevance of those records to the resolution of a claim properly before that agency. The nations' colleges and universities should not be burdened by the costs and problems incident to disclosure of such records, and the privacy interests of their faculty members should not be intruded upon further, without this Court's determination of who has the burden of proving relevance or lack of relevance of such records.

For these reasons, amicus respectfully urges that certiorari be granted.

ARGUMENT

1. This Court Should Grant Certiorari To Determine Whether, Under *County of Washington v. Gunther*, Charging Parties Under Title VII Can Establish A Cause of Action For Salary Discrimination Based *Solely* Upon a Comparison Of Salaries Paid To Faculty Members In Different Professional Fields.

The academic marketplace, like any other, is responsive to market forces which reflect supply and demand.[1] Not surprisingly, supply and demand for faculty services in a specific field is a dynamic process which, at any given point in time, is dependent on such factors as: the level of student enrollments, government funding and research and development expenditures by private industry in that field;[2] the extent of demand for such services by com-

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[1]Krueger, "The Changing Economic Status of the Profession and the Impact of Inflation," *Academe*, December 1979, at 487 (1979).

[2]*See* Krueger, note 1 *supra*.

peting government and industry employers;[3] and the number of new graduates entering the marketplace to compete for the available job opportunities.[4]

As a result, faculty members engaged in different disciplines command different salaries. For example, during the 1979-1980 academic year, Professors of Law, Business Computer Sciences, Medicine and Engineering at 68 state universities and land-grant colleges had substantially higher salaries than Professors of Agriculture, Education, Fine Arts and Nursing.[5] The same factors apply even within academic fields. For example, faculty members teaching Petroleum Engineering today can command salaries substantially greater than faculty engaged in Civil Engineering.[6]

The issue presented in the instant case and specifically left unresolved by this Court's recent decision in *County of Washington v. Gunther*, 49 U.S.L.W. 4623 (June 8, 1981), is whether, absent an allegation of intentional discrimination, Title VII permits a cause of action based on a comparison of the wage rates of different jobs.

The charge filed by the ANA in the instant case merely alleged that the University paid female members in the School of Nursing less than the University was paying

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[3]Hunter, Ventimiglia & Crow, "Faculty Moral in Higher Education," 31 *Journal of Teacher Education*, 27, 28 (March-April, 1980).

[4]*See* Krueger, note 1 *supra*.

[5]Office of Institutional Research, Oklahoma State University, "How Much Professors Are Paid," *The Chronicle of Higher Education*, at 9 (April 14, 1980).

[6]Office of Institutional Research, Oklahoma University, "Faculty Salaries, By Discipline," *The Chronicle of Higher Education*, at 10 (April 14, 1980).

male faculty members which the evidence established were employed in separate and distinct professional schools. The charge did not allege that such underpayment, if established, was the result of intentional discrimination based upon sex.

In *County of Washington v. Gunther, supra,* this Court, in a 5 to 4 decision, held that female guards could attempt to establish a case of intentional salary discrimination under Title VII by introducing evidence of the salaries paid to male guards in the same jail, where the salaries of the females, but not the males, were set at a level lower than that warranted by the County's own survey of outside markets and the worth of the jobs. In so holding, the majority decision in *Gunther* emphasized that its ruling was a narrow one limited to cases of intentional discrimination and that the case did not involve the "controversial concept of 'comparable worth'." 49 U.S.L.W. at 4624-25, 4628. The Court defined "comparable worth" as a claim for increased compensation based upon a comparison of the intrinsic worth or difficulty of a particular job compared to other jobs in the same organization or community. 49 U.S.L.W. at 4625.

The majority opinion in *Gunther* pointed out that respondents had distinguished *Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980), on the ground that in *Lemons,* the plaintiff nurses, who were employed by a public hospital, sought increased compensation (without direct proof of intentional discrimination) on the basis of a comparison of their salaries with the salaries paid to non-nurse employees the plaintiffs asserted were of comparable value to the community. 49 U.S.L.W. at 4625 n.7.

The instant case is more similar to *Lemons* than to *Gunther* in that here the American Nurses' Association is at-

tempting without any direct allegation of intentional discrimination, to obtain increased compensation for its constituents by comparing their faculty salaries with those paid in unrelated professional schools. The case squarely involves a charge of discrimination based solely upon "a *comparison* of the wage rates of dissimilar jobs," (emphasis in original), 49 U.S.L.W. at 4635, (Rehnquist, J., dissenting), in that EEOC admittedly is attempting to compare wage rates paid in separate and distinct professions – despite the unrebutted evidence that no such comparisons can be made – and is not alleging any intentional discrimination. In addition, unlike *Gunther,* the charge here requires a Court to make its own subjective assessment of the comparable values of completely dissimilar jobs. 49 U.S.L.W. at 4628-29.

In cases not involving intentional discrimination, other courts of appeals have found that salary discrimination cannot be proven by comparing the salaries of one profession with those of another. *Lemons v. City and County of Denver, supra* (comparison of nurses' jobs to other jobs is inappropriate). *See also Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) (female professor could not show sex-based salary discrimination by comparing her salary to the salaries of professors in other departments of a university); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977) (female clerical employees at a state university could not establish salary discrimination by comparing their salaries with male employees in a school's physical plant department). *Cf., EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974) (in subpoena enforcement action, salaries of other faculty members in a School of Engineering were relevant to discrimination charge by faculty

members in the Electrical Engineering Department of that School).

As indicated by Justice Rehnquist, *Gunther's* narrow holding does not establish any legal criteria by which courts and litigants can determine what, if any, salary comparisons are relevant under Title VII. Without further guidance from this Court, *Gunther* will spawn further litigation "as surely as day follows night."[7] This case should be treated as a natural corollary to *Gunther,* and this Court should determine whether Title VII permits "a cause of action based on a comparison of the wage rates of dissimilar jobs," the type of comparisons at issue herein. If such comparisons are not appropriate, the salary administration practices currently in place at most of the nation's colleges and universities will not be affected by *Gunther.* If such comparisons can be made, then extensive changes in current practices may be necessary. This important issue should be decided promptly.

2. This Court Should Grant Certiorari To Resolve Whether An Academic Employer Has The Burden Of Going Forward With The Evidence On Whether Salary Comparisons Between Different Professions Are Relevant.

In subpoena enforcement actions not involving Title VII subpoenas, this Court and many circuit courts have held that the Government has the burden of establishing that the information sought is relevant to a legitimate administrative purpose. *United States v. Powell,* 379 U.S. 48 (1964); *United States v. LaSalle National Bank,* 437 U.S.

[7]Finger, "Analysis of U.S. Supreme Court Ruling In County of Washington v. Gunther," *BNA Daily Labor Reports,* No. 117, at A-2.

298 (1978); *United States v. McCarthy,* 514 F.2d 368 (3rd Cir. 1975).

It is unclear, however, how the *Powell* standards apply in Title VII subpoena actions. The burden of proof question presented in this case is whether the EEOC established the relevance of the material sought merely by stating its belief that faculty members in separate and distinct professional schools are all "teachers" who must be "performing similar duties" and, therefore, whose salaries must be comparable. This misconception, absent any evidence to support it, should not be sufficient to meet the *Powell* standards.

The Council is particularly distressed that on appeal the Third Circuit appeared to hold that the salary data sought by the EEOC was relevant for a reason other than that claimed in the court below. Whatever the Third Circuit meant by holding that the information subpoenaed "may provide a useful context for evaluating the practices under investigation," this justification for relevance was not presented by the EEOC in the District Court. Moreover, it provides no guidance to the EEOC or to academic institutions as to how and why practices in separate and distinct professional schools provide a useful context for evaluating practices in a School in Nursing.

Accordingly, the Council respectfully submits that this Court should grant certiorari in order to enunciate the standards and procedures to be followed in subpoena enforcement actions against academic institutions under Title VII.

3. This Court Should Grant Certiorari Because The Decision Below Implicates Important Issues Of National Interest.

The subpoena in the instant case is extremely broad, and, undisputed facts of record show that the information sought is of little or no relevance to the complaint being investigated by the EEOC. The cost of complying with administrative subpoenas is a cost that necessarily reduces the pool of funds available for carrying out an institution's educational programs and activities. This is especially important today, when the nation's colleges and universities are faced with shrinking enrollments, declining endowments and less generous legislative appropriations.[8] While complying with administrative subpoenas is a burden all citizens including the nations' colleges and universities must bear, it is not a burden which should be placed lightly upon academic institutions. Certainly, where information is *clearly* relevant, an institution must absorb the expense and time of producing requested information. However, where the information is not relevant, the institution should be permitted to spend its resources in furtherance of its primary mission- educating students.

Accordingly, amicus respectfully submits that this Court should grant the petition in this case and resolve these issues of national importance.

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[8]*See, e.g.,* Jacobson, "What Worries College Presidents," *The Chronicle of Higher Education* 11 (Aug. 25, 1980); Tuckman & Tuckman, "The Structure of Salaries at American Universities," 47 *Journal of Higher Education* 51 (Jan., Feb. 1976).

CONCLUSION

For the foregoing reasons, the American Council on Education respectfully urges this Court to grant certiorari in the instant case.

Respectfully submitted,

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